

Securities and Exchange Commission

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based. If the staff determines that the request is reasonable and appropriate it will be granted and the letter or other communication will not be made available for public inspection or copying until the expiration of the specified period. If it appears to the staff that the request for confidential treatment should be denied, the staff shall so advise the person making the request and such person may withdraw the letter or other communication within 30 days thereafter. In such case, no response will be sent or given and the letter or other communication shall remain in the Commission's files but will not be made public. If such letter or other communication is not so withdrawn, it shall be deemed to be available for public inspection and copying together with any written response thereto.

NOTE: All letters or other written communications requesting interpretative advice, a no-action position, or an exemption shall indicate prominently, in a separate caption at the beginning of the request, each section of the Act and each rule to which the request relates. If more than one section or rule is involved, a separate copy of the request shall be submitted for each section or rule involved and an additional copy for the use of the staff of the Commission.

(c) This section shall not apply, however, to letters of comment or other communications relating to the accuracy or adequacy of any registration statement, report, proxy, or information statement or other document filed with the Commission, or relating to the extent to which such statement, report, or document complies with any applicable requirement. Further, this section shall not apply to applications or other written communications filed pursuant to §240.24b-2 that relate to objections to public disclosure of information filed with the Commission or any exchange.

[35 FR 17779, Nov. 19, 1970, as amended at 53 FR 12413, Apr. 14, 1988; 53 FR 32605, Aug. 26, 1988]

§ 200.82 Public availability of materials filed pursuant to § 240.14a-8(d) and related materials.

Materials filed with the Commission pursuant to Rule 14a-8(d) under the Securities Exchange Act of 1934 (17 CFR 240.14a-8(d)), written communications

related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

[37 FR 20558, Sept. 30, 1972]

§ 200.82a Public availability of materials filed pursuant to § 240.14a-11(g) and related materials.

Materials filed with the Commission pursuant to Rule 14a-11(g) under the Securities Exchange Act of 1934 (17 CFR 240.14a-11(g)), written communications related thereto received from interested persons, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

[75 FR 56780, Sept. 16, 2010]

EFFECTIVE DATE NOTE: At 75 FR 56780, Sept. 16, 2010, §200.82a was added, effective Nov. 15, 2010. At 75 FR 64641, Oct. 20, 2010, the effective date was delayed until further notice.

§ 200.83 Confidential treatment procedures under the Freedom of Information Act.

(a) *Purpose.* This section provides a procedure by which persons submitting information in any form to the Commission can request that the information not be disclosed pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552. This section does not affect the Commission's right, authority, or obligation to disclose information in any other context. This section is procedural only and does not provide rights to any person or alter the rights of any person under the Freedom of Information Act or any other applicable statute or regulation.

(b) *Scope.* The provisions of this section shall apply only where no other statute or Commission rule provides procedures for requesting confidential treatment respecting particular categories of information (*see, e.g.*, 17 CFR 240.24b-2) or where the Commission has not specified that an alternative procedure be utilized in connection with a particular study, report, investigation, or other matter. The provisions of this section shall not apply to any record

which is contained in or is part of a personnel, medical or similar file relating to a Commission member or employee which would normally be exempt from disclosure pursuant to section 552(b)(6) of title 5, U.S. Code.

(c) *Written request for confidential treatment to be submitted with information.* (1) Any person who, either voluntarily or pursuant to any requirement of law, submits any information or causes or permits any information to be submitted to the Commission, which information is entitled to confidential treatment and for which no other specific procedure exists for according confidential treatment, may request that the Commission afford confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality, or for any other reason permitted by Federal law, and should take all steps reasonably necessary to ensure, as nearly as practicable, that at the time the information is first received by the Commission (i) it is supplied segregated from information for which confidential treatment is not being requested, (ii) it is appropriately marked as confidential, and (iii) it is accompanied by a written request for confidential treatment which specifies the information as to which confidential treatment is requested.

(2) A person who submits a record to the Commission for which he or she seeks confidential treatment must clearly mark each page or segregable portion of each page with the words “Confidential Treatment Requested by [name]” and an identifying number and code, such as a Bates-stamped number. In his or her written confidential treatment request, the person must refer to the record by identifying number and code.

(3) In addition to giving a copy of any written request for confidential treatment to the Commission employee receiving the record in question, the person requesting confidential treatment must send a copy of the request (but not the record) by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549. The legend “FOIA Confidential Treatment Re-

quest” must clearly and prominently appear on the top of the first page of the written request, and the written request must contain the name, address, and telephone number of the person requesting confidential treatment. The person requesting confidential treatment is responsible for informing the Office of Freedom of Information and Privacy Act Operations promptly of any changes in address, telephone number, or representation.

(4) In some circumstances, such as when a person is testifying in the course of a Commission investigation or providing a record requested in the course of a Commission examination or inspection, it may be impracticable to submit a written request for confidential treatment at the time the record is first given to the Commission. In no circumstances can the need to comply with the requirements of this section justify or excuse any delay in submitting any record to the Commission. The person testifying or otherwise submitting the record must inform the Commission employee receiving it, at the time the record is submitted or as soon thereafter as possible, that he or she is requesting confidential treatment. The person must then submit a written confidential treatment request within 30 days from the date of the testimony or the submission of the record. Any confidential treatment request submitted under this paragraph must also comply with paragraph (c)(3) of this section.

(5) Where confidential treatment is requested by the submitter on behalf of another person, the request must identify that person and provide the telephone number and address of that person or the person’s responsible representative if the submitter would be unable to provide prompt substantiation of the request at the appropriate time.

(6) No determination on a request for confidential treatment will be made until the Office of Freedom of Information and Privacy Act Operations receives a request for disclosure of the record.

(7) A confidential treatment request will expire ten years from the date the Office of Freedom of Information and

Privacy Act Operations receives it, unless that Office receives a renewal request before the confidential treatment request expires. The renewal request must be sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549, and must clearly identify the record for which confidential treatment is sought. A renewal request will likewise expire ten years from the date that Office receives it, unless that Office receives another timely renewal request which complies with the requirements of this paragraph.

(8) A confidential treatment request shall be nonpublic. If an action is filed in a Federal court, however, by either the Freedom of Information requester (under 5 U.S.C. 552(a)(4) and § 200.80(d)(6)) or by the confidential treatment requester (under paragraph (e)(5) of this section), the confidential treatment request may become part of the court record.

(d) *Substantiation of request for confidential treatment.* (1) If it is determined that records which are the subject of a request for access under the Freedom of Information Act are also the subject of a request for confidential treatment under this rule and no other grounds appear to exist which would justify the withholding of the records [e.g., Freedom of Information Act Exemption 7(A), 5 U.S.C. 552(b)(7)(A)], the Commission's Freedom of Information Act Officer promptly shall so inform the person requesting confidential treatment or, in the case of a request made on behalf of a person other than the submitter, the person identified as able to provide substantiation, by telephone, facsimile or certified mail and require that substantiation of the request for confidential treatment be submitted in ten calendar days. Failure to submit a written substantiation within ten calendar days from the time of notification, or any extension thereof, may be deemed a waiver of the confidential treatment request and the confidential treatment requester's right to appeal an initial decision denying confidential treatment to the Commission's General Counsel as permitted by paragraph (e) of this section.

(2) Substantiation of a request for confidential treatment shall consist of a statement setting forth, to the extent appropriate or necessary for the determination of the request for confidential treatment, the following information regarding the request:

(i) The reasons, concisely stated and referring to specific exemptive provisions of the Freedom of Information Act, why the information should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions which govern or may govern the treatment of the information;

(iii) The existence and applicability of any prior determinations by the Commission, other Federal agencies, or a court, concerning confidential treatment of the information;

(iv) The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position;

(v) The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the Commission;

(vi) The ease or difficulty of a competitor's obtaining or compiling the commercial or financial information;

(vii) Whether the commercial or financial information was voluntarily submitted to the Commission and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the Commission;

(viii) The extent, if any, to which portions of the substantiation of the request for confidential treatment should be afforded confidential treatment; and

(ix) Such additional facts and such legal and other authorities as the requesting person may consider appropriate.

(e) *Appeal from initial determination that confidential treatment is not warranted.* (1) In a preliminary decision, which shall be sent by mail or facsimile, or both, the Office of Freedom

of Information and Privacy Act Operations will inform the confidential treatment requester whether it intends to grant confidentiality in whole or in part and give the requester ten calendar days from the date of the preliminary decision to submit supplemental arguments if the requester disagrees with the preliminary decision. A final decision, which shall also be sent by mail or facsimile, or both, no sooner than ten calendar days from the date of the preliminary decision, shall inform the Freedom of Information Act requester and the confidential treatment requester of his or her right to appeal an adverse decision to the Commission's General Counsel within ten calendar days from the date of the final decision. Records, which the Freedom of Information and Privacy Act Officer determines to be releasable, may be released to the Freedom of Information Act requester ten calendar days after the date of the final decision. However, if within those ten calendar days, the Freedom of Information and Privacy Act Officer receives an appeal from the confidential treatment requester, he or she shall inform the Freedom of Information Act requester that an appeal is pending and that the records will not be released until the appeal is resolved.

(2) Any appeal of a denial of a request for confidential treatment shall be in writing, and shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by the legend "FOIA Confidential Treatment Appeal." The appeal must be sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549, or by facsimile (202-772-9337). A copy of the appeal must be mailed to the General Counsel, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. The person requesting confidential treatment may supply additional substantiation of the request for confidential treatment in connection with the appeal to the General Counsel.

(3) The General Counsel shall have the authority to consider all appeals from decisions of the Freedom of Information Act Officer with respect to confidential treatment. All appeals taken under this section will be considered by

the General Counsel as expeditiously as circumstances permit. Although other procedures may be employed, to the extent possible, the General Counsel will decide the matter on the basis of the affidavits and other documentary evidence submitted by the interested persons and such other information as is brought to the attention of the General Counsel. The General Counsel shall also have the authority to enter and vacate stays under the circumstances set forth in paragraph (e)(5) of this section. In appropriate cases the General Counsel may, in his or her sole and unfettered discretion, refer appeals and questions concerning stays under paragraph (e)(5) of this section to the Commission for decision.

(4) If it is determined that confidential treatment is not warranted with respect to all or any part of the information in question, the person requesting confidential treatment will be so informed by telephone, if possible, with a facsimile or certified mail letter directed to the person's last known address. Disclosure of the information under the Freedom of Information Act will occur ten calendar days after notice to the person requesting confidential treatment, subject to any stay entered pursuant to paragraph (e) (5) of this section.

(5) If within that ten calendar day period the General Counsel has been notified that the person requesting confidential treatment has commenced an action in a Federal court concerning the determination to make such information publicly available, the General Counsel will stay making the public disclosure of the information pending final judicial resolution of the matter. The General Counsel may vacate a stay under this section either on his or her own motion or at the request of a person seeking access to the information under the Freedom of Information Act. If the stay is vacated, the information will be released under the Freedom of Information Act ten calendar days after the person requesting confidential treatment is notified of this action by telephone, if possible, with a facsimile or certified mail letter sent to the person's last known address, unless the court orders otherwise.

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(f) *Initial determination that confidential treatment is warranted.* If it is determined by the Commission's Freedom of Information Act Officer that confidential treatment is warranted, the person submitting the information and the person requesting access to the information under the Freedom of Information Act will be so informed by mail. The person requesting access, pursuant to the Freedom of Information Act, will also be informed of the right to appeal the determination to the General Counsel. Any such appeal must be taken in accordance with the provisions of the Freedom of Information Act and Commission rules thereunder. See 17 CFR 200.80(d)(6).

(g) *Confidential treatment request and substantiation as nonpublic.* Any confidential treatment request and substantiation of it shall be nonpublic. If an action is filed in a Federal court, however, by either the Freedom of Information Act requester (under 5 U.S.C. 552(a)(4) and § 200.80(d)(6)) or by the confidential treatment requester (under paragraph (e)(5) of this section), both request and substantiation may become part of the public court record.

(h) *Effect of no prior request for confidentiality.* (1) If access is requested under the Freedom of Information Act to information which is submitted to the Commission on or after October 20, 1980 with respect to which no request for confidential treatment has been made pursuant to either paragraph (c)(1) or (c)(5) of this section, it will be presumed that the submitter of the information has waived any interest in asserting an exemption from disclosure under the Freedom of Information Act for reasons of personal privacy or business confidentiality, or for other reasons.

(2) Notwithstanding paragraph (h)(1) of this section, in appropriate circumstances, any person who would be affected by the public disclosure of information under the Freedom of Information Act may be contacted by Commission personnel to determine whether the person desires to make a request for confidential treatment. Any request for confidential treatment that is asserted in response to such inquiry shall be made in accordance with provisions of this section.

(i) *Extensions of time limits.* Any time limit under this section may be extended in the discretion of the Commission, the Commission's General Counsel, or the Commission's Freedom of Information Act Officer for good cause shown.

(j) *Electronic filings.* Confidential treatment requests shall be submitted in paper format only, whether or not the person making the request is an electronic filer.

(k) In their discretion, the Commission, the Commission's General Counsel, and the Freedom of Information Act Officer may use alternative procedures for considering requests for confidential treatment.

[45 FR 62421, Sept. 19, 1980, as amended at 47 FR 20289, May 12, 1982; 58 FR 14659, Mar. 18, 1993; 65 FR 55184, 55185, Sept. 13, 2000; 73 FR 32225, June 5, 2008]

Subpart E [Reserved]

Subpart F—Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees

AUTHORITY: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11, and 7202; and 5 U.S.C. 557.

§ 200.110 Purpose.

This code is adopted in conformity with section 4 of the Government in the Sunshine Act, Pub. L. 94–409, and is designed to insulate the administrative process from improper influence.

[42 FR 14690, Mar. 16, 1977]

§ 200.111 Prohibitions; application; definitions.

(a) *Prohibited communications.* In any agency proceeding which is subject to this subpart, except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the agency shall make or knowingly cause to be made to any member of the Commission or decisional employee an ex parte communication relevant to the merits of the proceeding; and

(2) No member of the Commission or decisional employee shall make or